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THE V-CHIP DEBATE: BLOCKING TELEVISION SEX, VIOLENCE, AND THE FIRST AMENDMENT

I. INTRODUCTION

For nearly half a century, Congress and the courts have struggled with the perceived negative influences of radio and television on society. The responses have ranged from banning obscenity and restricting indecent speech to abridging the First Amendment rights of the broadcast industry.

Television violence, the most recent issue to surface, presents a serious conflict between protecting children from the potentially harmful influence of exposure to violence, and the First Amendment rights of broadcasters. Congress fired the latest salvo in this struggle with the passage of the Telecommunications Act of 1996.¹ Section 551, entitled "Parental Choice in Television Programming," requires all new television sets with screens thirteen inches or larger to contain a V-Chip within two years, a device that allows parents to automatically block programs that have been labeled as containing high levels of violence or sex.²

This Comment addresses the constitutionality of the V-Chip legislation in light of public interests and media rights. Part II reviews the effect of television violence on children and the reasons behind current levels of televised violence. Part III analyzes the V-Chip technology. Part IV reviews the requirements of the V-Chip legislation and the response to that legislation. Part V analyzes the V-Chip legislation in the context of the First Amendment and summarizes the constitutional issues. Finally, Part VI proposes a solution to the issues raised by the V-Chip legislation.

II. THE EPIDEMIC OF TELEVISION VIOLENCE

A. *The Effect of Television Violence*

"The American Psychological Association estimates that the average American child sees more than 100,000 acts of violence and 8000 murders

1. Telecommunications Act of 1996, Pub. L. No. 104-104, § 551, 110 Stat. 56, 139-42 (1996).

2. See *id.*

on television before reaching adolescence"³ This alarming statistic exposes a problem of increasing public concern: what negative effect does television violence have on children and what can be done to stop it?

Numerous studies have been conducted in an effort to determine how exposure to television violence affects the social and psychological well-being of both children and adults. The American Psychological Association's commission on violence and youth, for example, found a correlation between exposure to high levels of television violence and increased aggressive behavior in children and adolescents.⁴ Experts most often cite an "increase[d] . . . likelihood of aggressive or antisocial behavior" due to children's viewing of violent programs including cartoons.⁵ Moreover, the effects of television violence are cumulative, with increased viewing of violent programs leading to higher levels of aggression in children who watch such programs.⁶

Following the initial showing of *The Deer Hunter* on network television, twenty-nine copycat incidents of the movie's Russian-roulette scene were reported.⁷ As a result, twenty-six adults and children died of self-inflicted gunshot wounds to the head.⁸ In a similar act of life imitating television, a five-year-old boy set fire to his trailer home after watching an episode of MTV's *Beavis and Butthead* in which the characters played with fire and joked about fire being "cool."⁹ As a result of this act, the boy's two-year-old sister was killed.¹⁰

A February 1996 study conducted by four universities and commissioned by the cable industry concluded that television violence is far more pervasive than previously imagined.¹¹ The study analyzed 2693 television programs on 23 channels during a 20 week period.¹² Violent acts were defined as "any overt depiction of the use of physical force—or the

3. Vincent Kiernan, *A Chip to Veto Violence on Television*, NEW SCIENTIST, Aug. 14, 1993, at 5.

4. *Videodrome*, THE ECONOMIST, Aug. 13, 1994, at 73.

5. Alexander K.C. Leung, M.B.B.S. et al., *Children & Television*, AM. FAM. PHYSICIAN, Oct. 1994, at 909, 912.

6. *Id.*

7. Amitai Etzioni, *Lock up Your TV Set*, NAT'L. REV., Oct. 18, 1993, at 50.

8. *Id.*

9. John Windhausen, *Congressional Interest in the Problem of Television and Violence*, 22 HOFSTRA L. REV. 783, 788 (1994).

10. *Id.*

11. MEDIASCOPE, INC., NATIONAL TELEVISION VIOLENCE STUDY — EXECUTIVE SUMMARY. (1994-95). The Council included members of the American Medical Association, the American Psychiatric Association, the American Academy of Pediatrics, and the American Psychological Association. *Id.* at vii.

12. *Id.* at 6-7.

credible threat of such force—intended to physically harm an animate being or group of beings.”¹³ The definition also included verbal threats of physical harm and scenes depicting the aftermath of unseen violent acts.¹⁴ The key findings of the study included:

1. The risks of viewing depictions of televised violence include learning aggressive attitudes and behavior, desensitization to the harmful effects of violence, and developing a fear of becoming a victim of violence.¹⁵

2. Perpetrators of television violence go unpunished in seventy-three percent of all violent scenes.¹⁶

3. The negative effects of violence are often not portrayed. Victims suffer no harm in forty-seven percent of all violent scenes.¹⁷ “Only 16% of all . . . programs depict[ed] the long-term negative” effects of violence including psychological, emotional, and financial harm.¹⁸

4. Twenty-five percent of all violent scenes on television involve a handgun.¹⁹

5. Violence was found in fifty-seven percent of the programs on television.²⁰ Eighty-five percent of the programming on premium cable channels contained violence as opposed to only eighteen percent of the programs on public broadcast television.²¹ Broadcast networks contained violence on forty-four percent of their programming.²²

6. Variation was also found among programming categories. One-hundred percent of police shows contained violence, “as do 85% of tabloid news programs . . . and 15% of talk shows.”²³

In 1972, the Surgeon General’s Office concluded that “the causal relationship between televised violence and anti-social behavior warranted appropriate and immediate remedial action.”²⁴ The courts have expressed a similar opinion. Chief Judge Harry Edwards of the D.C. Circuit, dissenting from a decision upholding the Federal Communication Commission’s (“FCC”) safe harbor for indecency, stated that violent programming

13. *Id.* at 3.

14. *Id.*

15. *Id.* at 4.

16. *MEDIASCOPE*, *supra* note 11, at 15.

17. *Id.* at 15-16.

18. *Id.* at 16.

19. *Id.* at 14.

20. *Id.* at 9.

21. *MEDIASCOPE*, *supra* note 11, at x.

22. *Id.*

23. *Id.* at 32.

24. Colman McCarthy, *Boycotting Glorified Violence*, WASH. POST, Aug. 8, 1992, at A19.

has a harmful effect.²⁵ A second, more obscure effect of exposure to television violence is the desensitization of viewers to the adverse effects of aggressive behavior which ultimately leads to a greater tolerance of "real" violence.²⁶

B. *The Market for TV Violence*

1. Advertising Influence

The television industry has long considered violence an effective means of attracting viewers.²⁷ Viewers wanted action and the broadcast industry responded. As early as the 1960s, the American Broadcasting Company ("ABC") found that programs featuring action and violence, such as *The Untouchables* and *The Rebel*, produced higher ratings and corresponding increases in program longevity and advertising revenues.²⁸

The proliferation of cable pay-per-view and premium stations, which are not subject to the FCC's public interest standards, has led to an increase in broadcast violence. Broadcasters responded to the new competition by increasing provocative and violent material to attract more viewers.

In recent years, however, this appetite for action and violence has waned.²⁹ Viewers still demand action, but are less willing to tolerate violence. The public outcry to reduce televised violence has been supported by at least one study that determined violent programs actually receive lower ratings than non-violent programs.³⁰

III. THE TECHNOLOGY

The violence chip, commonly known as the V-Chip, appears to offer a practical solution to the problem of television violence. The V-Chip is a programmable computer chip that will be installed in new television sets with screen thirteen inches or larger. It will decode rating information about each program and block programs containing a violence rating above

25. *Action for Children's Television v. FCC*, 58 F.3d 654, 682 (D.C. Cir. 1995) (Edwards, J., dissenting).

26. Meg Greenfield, *TV's True Violence*, NEWSWEEK, June 21, 1993, at 72.

27. Stephen J. Kim, "Viewer Discretion Is Advised": *A Structural Approach to the Issue of Television Violence*, 142 U. PA. L. REV. 1383, 1422-23 (1994).

28. *Id.* at 1423.

29. *Id.* at 1430.

30. *Id.* (citing George Gerbner, Highlights of the Television Profile No. 16, at 2-3 (Jan. 27, 1994) (unpublished manuscript presented at the National Association of Television Program Executives' Annual Conference, Miami Beach, Fla.)).

the level set by parents.³¹ Television programs will carry coding signals in the vertical blanking interval, the black bar that appears when a television loses vertical hold,³² along with Extended Data Service ("EDS") signals for emergency alerts, weather advisories, and closed captioning signals.³³

The Electronics Industries Association's Television Data Systems subcommittee has already proposed a technical standard for the V-Chip technology.³⁴ The V-Chip data packet would contain the violence rating or other ratings in three data bits.³⁵ Each data bit has a possible value of 0 or 1, thus providing up to eight combinations of ratings from 000 to 111.³⁶ "Three other [data] bits . . . are reserved for program content advisories."³⁷

The V-Chip signal would be transmitted as a "data packet in the vertical blanking interval" of a television program.³⁸ The V-Chip could be programmed by the television owner to block viewing of V-rated programs during certain hours.³⁹

Inclusion of V-Chips in new televisions is estimated to cost between \$5 and \$40 per television.⁴⁰ The actual V-Chip will cost only about \$5 each,⁴¹ but lower priced televisions will likely require additional circuitry and wiring, costing up to \$35 per unit.⁴² Most of that circuitry is already present in more expensive models.⁴³

A trial version of the V-Chip underwent testing on a premium pay service in Edmonton, Canada early in 1995.⁴⁴ Programs were rated for (1) violence, (2) language, and (3) sexual content and nudity, and were coded with a single digit, ranging from one to nine, in each of the

31. Murray Slovick, *The Violence Chip*, POPULAR MECHANICS, May, 1994, at 114.

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. Slovick, *supra* note 31, at 114.

37. *Id.*

38. *Id.* at 115.

39. *Id.*

40. Lewis M. Andrews, *Private Ratings*, NAT'L REV., Sept. 25, 1995, at 81, 82.

41. *Id.*

42. Glen Dickson, *How's it Work? The V-chip Is Based on Closed-Captioning Technology*, BROADCASTING & CABLE, Feb. 12, 1996, at 24.

43. *Id.*

44. Daniel Howard Cerone, *'V-Chip' for TVs: Boon to Parents or Big Brother?*, L.A. TIMES, Sept. 1, 1995, at A1; *see also* Craig Turner, *Not Ready for Prime Time*, L.A. TIMES, Aug. 28, 1995, at D1.

categories.⁴⁵ More explicit programs were assigned higher numerical values.⁴⁶ Ratings closely paralleled those given to the movies during their theatrical release.⁴⁷ A movie with an "R" theatrical rating was rated a seven in all three categories.⁴⁸

A second test is underway in which the ratings system have been simplified.⁴⁹ In this newest test, programs are rated from zero to five in each of three categories: violence, language, and sexual content.⁵⁰ Parents will be able to set acceptable thresholds for their families.⁵¹ For instance, if they set their V-Chip to level three in each of the categories, then any program that exceeds a three in any of the categories will be blocked.⁵²

IV. CONGRESSIONAL RESPONSE

A. *The Telecommunications Act of 1996*

Section 551 of the Telecommunications Act of 1996 ("Telecommunications Act") requires all television sets with screens larger than thirteen inches to be equipped with circuitry capable of selectively blocking coded programs.⁵³ This carefully worded law suggests that broadcasters voluntarily rate programs and send the rating signal, but does not actually require them to do so.⁵⁴

The Telecommunications Act is not without its shortcomings. First, the law does not address inherent non-glamorized violence that appears in television news programs and sporting events. Second, the law encourages broadcasters to establish their own rating system, but authorizes the FCC to appoint an advisory committee to create a rating system if one is not established by the broadcasters within one year of the Act's passage.⁵⁵ The advisory committee is to consist of parents, television broadcasters,

45. Turner, *supra* note 44, at D4.

46. *Id.*

47. *Id.*

48. *Id.*

49. Jim Impoco, *Another view of TV ratings*, U.S. NEWS & WORLD REP., Feb. 19, 1996, at 37.

50. *Id.* at 39.

51. *See generally id.*

52. *Id.*

53. Telecommunications Act of 1996, *supra* note 1.

54. *Id.*

55. *Id.*

television producers, cable operators, public interest groups, and other interested individuals.⁵⁶ Critics complain that this provision could place the government in the position of determining violence ratings and, ultimately, which programs are broadcast. Government regulation of television violence raises significant constitutional concerns because of First Amendment restrictions upon the ability of the government to limit television violence.⁵⁷

B. Response to the V-Chip

1. The Public

The V-Chip has found support with the general public. A 1995 *Hollywood Reporter* poll indicated eighty-two percent of Americans favor the V-Chip.⁵⁸ The cable industry also endorses the V-Chip.⁵⁹ Ted Turner, president and chairman of Turner Broadcasting System ("TBS"), has expressed support for the V-Chip technology.⁶⁰ Yet support has been cautious.⁶¹ Matthew Blank, president of Showtime Networks has stated, "[w]e have some serious societal issues here. The Vchip [sic] seems like an overly simple solution to a very complicated problem."⁶²

Opponents of the V-Chip include the conservative Christian Coalition, the liberal American Civil Liberties Union ("ACLU"),⁶³ the National Association of Broadcasters, the Motion Picture Association of America, and the Radio and Television News Directors Association.⁶⁴ Some opponents argue that the V-Chip is unconstitutional because the law's definition of violence is vague, overbroad, and unnecessarily inhibits the free speech rights of the media.

56. *Id.*

57. Benjamin P. Deutsch, *Wile E. Coyote, Acme Explosives and the First Amendment: The Unconstitutionality of Regulating Violence on Broadcast Television*, 60 BROOK. L. REV. 1101, 1104 (1994). See generally James A. Albert, *Constitutional Regulation of Televised Violence*, 64 VA. L. REV. 1299 (1978) (arguing that regulatory measures restricting violence on television should not be barred by the First Amendment).

58. Cerone, *supra* note 44, at A32.

59. Slovick, *supra* note 31, at 114.

60. *Id.*

61. Ginia Bellafante, *Locking Out Violence*, TIME, July 24, 1995, at 64.

62. *Id.*

63. Dennis Wharton, *Nets Bow Chip Alternative*, DAILY VARIETY, Aug. 2, 1995, at 3.

64. *House Passes Dereg Bill*, MEDIAWEEK, Aug. 7, 1995, at 6.

2. Broadcast and Cable Industries

The broadcast industry cites several problems with the V-Chip, including advertiser response and the inability of the V-Chip to distinguish among different types of violence. Broadcasters are concerned about the response of advertisers who may be reluctant to sponsor controversial shows.⁶⁵ Tabloid shows, such as *A Current Affair* and *Hard Copy*, quickly learned that controversial re-enactments hurt their advertising appeal when their sponsors stopped advertising.⁶⁶ Both Proctor & Gamble and Kraft Foods, for example, have policies against advertising during programs with excessive violence.⁶⁷ In fact, *A Current Affair* saw an increase in advertisers when it began to avoid re-enactments.⁶⁸

Broadcasters were quick to join critics of the V-Chip law, calling it unconstitutional and arguing that labeling constitutes censorship.⁶⁹ A Capital Cities/ABC spokesperson said, "this is clearly the first step on the road to government regulation of what we air."⁷⁰

Representative Edward J. Markey (D-Massachusetts) insists that the law presents absolutely no impact on freedom of speech rights.⁷¹ "Broadcasters will still have every right to create any program they want, they will have the right to use any words or visual images they want, and they will have the right to transmit those images or words to every home in America if they want."⁷² Representative Markey argues that it is the First Amendment rights of parents and children that are really at stake.⁷³

If broadcasters are allowed to air any and all programming they want, then parents should have the right to block out any and all programming [sic] that they don't want. In that way, there's a perfect constitutional synergy that allows for the right to speak

65. *Id.* Senator Kent Conrad (D-N.D.) stated the broadcasters "made [it] very clear to me the thing they're concerned about is that it will put them at an economic disadvantage compared to the cable industry." Cerone, *supra* note 44, at A32.

66. Raymond L. Fischer, *Is it Possible to Regulate Television Violence?*, USA TODAY, July 1994, at 72, 75.

67. *Id.*

68. *Id.*

69. *Experts Tackle V-Chip*, TELEVISION DIG., Aug. 28, 1995, at 4.

70. Christopher Stern, *Clinton Puts V-Chip on Fast Track*, BROADCASTING & CABLE, July 17, 1995, at 6.

71. Edward J. Markey, *Why the Markey Chip Won't Hurt You*, BROADCASTING & CABLE, Aug. 14, 1995, at 10.

72. *Id.*

73. *Id.* at 15.

and the right to keep speech out of homes of individuals with small children.

That's the balance that we've struck with the First Amendment and individual rights for 200 years, and this bill continues that tradition without in any way impeding First Amendment rights of broadcasters to say whatever they want.⁷⁴

Broadcasters also argue that rating systems are flawed because they are unable to distinguish between various types of violence.⁷⁵ Critics claim that a V-Chip cannot distinguish between *Terminator*, *Alien*, and *Schindler's List*.⁷⁶ Each of these programs would carry similar ratings without consideration of the educational or historical value of the latter. According to Lynn McReynolds, Vice President of Media Affairs for the National Association of Broadcasters, "[w]e have problems with any technology that makes a blanket judgment about programming."⁷⁷

Broadcasters also cite the burdensome nature of rating thousands of hours of programming,⁷⁸ and the inevitable slippery-slope effect.⁷⁹ Today it is the violence chip, tomorrow it will be the sex chip, the commercial chip, the game show chip, or perhaps the news chip.⁸⁰

The broadcasters and networks have a self-serving concern about a technology that allows parents to block hundreds of television shows with the push of a button, thus sacrificing advertising revenue.⁸¹ Generally, broadcasters prefer an educational approach that would train parents in making smart choices.⁸² In place of a V-Chip, broadcasters support a blocking device that would allow parents to block specific shows or channels without the use of a rating system.⁸³ Representative Markey criticized the networks' blocking device solution as wholly unworkable stating that "[p]arents cannot go through every single program on every single page of *TV Guide* every single week."⁸⁴

The cable industry is far less concerned than the broadcast industry about the response of advertisers, which explains their lukewarm support

74. *Id.*

75. Cerone, *supra* note 44, at A33.

76. *Id.*

77. Bellafante, *supra* note 61, at 64.

78. Cerone, *supra* note 44, at A33.

79. Etzioni, *supra* note 7, at 54.

80. *Id.*

81. Wharton, *supra* note 63, at 13; *see also* Bellafante, *supra* note 61, at 64.

82. Cerone, *supra* note 44, at A32.

83. Christopher Stern, *Broadcasters Seek V-Chip-Less Solution*, BROADCASTING & CABLE, July 24, 1995, at 17.

84. Markey, *supra* note 71, at 11.

of the V-Chip. Cable broadcasters typically derive only a small fraction of their revenue from advertising, relying instead on fundraisers, grants, subscriptions, and local cable revenues.⁸⁵ In addition, the cable industry has generally been more proactive in controlling programming content. For example, Lifetime Television, a cable channel, screens its programming for gratuitous violence against women.⁸⁶

V. FIRST AMENDMENT CONCERNS

The First Amendment states: "Congress shall make no law . . . abridging the freedom of speech"⁸⁷ The First Amendment guarantees freedom of speech, but does not define it. A number of doctrines have emanated from the Supreme Court in an effort to define the extent of First Amendment protection for the freedom of speech. The constitutionality of the V-Chip legislation will likely focus on First Amendment issues including content-based restrictions and the pervasive nature of television.

A. Content-Based Restrictions

When government seeks to regulate speech because of its perceived impact, the courts require substantial justification and subject the regulation to the highest level of scrutiny. Generally, content-based restrictions are held to be unconstitutional unless the government demonstrates that the restriction is "reasonably necessary to achieve . . . compelling [governmental] interests"⁸⁸ However, the Supreme Court has held that some categories of speech, such as obscenity and defamation, are not entitled to First Amendment protection.⁸⁹ Content-based restrictions of these categories of speech are subject to a lower standard of scrutiny in determining their constitutionality.⁹⁰ First Amendment protection for television violence depends on whether it belongs to one of several categories of unprotected speech.

While the Supreme Court has never addressed violence in the broadcast media, the Court has identified several categories of speech

85. Cerone, *supra* note 44, at A32.

86. Jim McConville, *Programmers Oppose Content Control*, BROADCASTING & CABLE, July 3, 1995, at 22; Fischer, *supra* note 66, at 73.

87. U.S. CONST. amend. I.

88. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395-96 (1992).

89. *See id.* at 382-84 (citing *Roth v. United States*, 354 U.S. 476 (1957); *Beauharnais v. Illinois*, 343 U.S. 250 (1952)) (recognizing that obscenity and defamation are not within the area of constitutionally protected speech).

90. *See also Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

outside the protective arms of the First Amendment including obscenity,⁹¹ incitement to illegal action,⁹² and indecent speech.⁹³ An examination of cases in these areas is useful in determining the constitutionality of the V-Chip legislation.

1. Obscenity

Obscene speech falls outside the scope of First Amendment protection and is subject to government regulation. In *Miller v. California*,⁹⁴ the Supreme Court defined an obscene work as one that:

(a) . . . "the average person, applying contemporary community standards," would find that the work, taken as a whole, appeals to the prurient interest; (b) . . . depicts or describes, in a patently offensive way, sexual conduct specifically defined by . . . state law; and (c) . . . taken as a whole, lacks serious literary, artistic, political, or scientific value.⁹⁵

Generally the Court has justified banning obscene speech based on overriding societal interests.⁹⁶

The definition of obscenity under *Miller* is not likely to encompass television violence. The definition focuses solely on offensive sexual conduct and does not include other objectionable activities. Despite the numerous studies addressing the impact of violence on children,⁹⁷ the Supreme Court is unlikely to analogize violent acts on television to obscenity. Therefore it is not likely that this speech is unprotected under a *Miller* analysis.

91. *R.A.V.*, 505 U.S. at 382-84 (citing *Roth v. United States*, 354 U.S. 476 (1957); *Beauharnais v. Illinois*, 343 U.S. 250 (1952)).

92. See *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

93. See *FCC v. Pacifica Found.*, 438 U.S. 726, 749 n.27 (1978); *Cohen v. California*, 403 U.S. 15 (1971).

94. *Miller v. California*, 413 U.S. 15 (1973).

95. *Id.* at 24. Material appealing to the "prurient interest" is defined as "material whose predominate appeal is to [excite] 'a shameful or morbid interest in nudity, sex, or excretion.'" *Brockett v. Spokane Arcades*, 472 U.S. 491, 498 (1985) (citing *Roth v. United States*, 354 U.S. 476 (1957)).

96. *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 57 (1973) (concluding that concern for public safety justifies suppression of obscene materials). See also *New York v. Ferber*, 458 U.S. 747, 753 (1982) (upholding a New York statute prohibiting the distribution of materials portraying children engaged in sexual activities based on the state's compelling interest in protecting children).

97. See, e.g., Leung, *supra* note 5.

2. Incitement of Illegal Action

Speech that incites illegal action is another category that is not afforded full First Amendment protection. In 1969, the Supreme Court enunciated the current incitement test.⁹⁸ The *Brandenburg* test has three requirements which must be met in order to find incitement and therefore unprotected speech. First, the danger posed by the speech must be imminent.⁹⁹ Second, the speaker must intend to cause imminent lawless action. Finally, that action must be likely to occur.

Television violence is unlikely to rise to the level of incitement. While studies have suggested a causal connection between television violence and real-world violence,¹⁰⁰ no study has proven that the latter is an imminent result of the former. Furthermore, there is no evidence to suggest that broadcasters intend their programming to cause a violent response.

B. Abridged First Amendment Rights of the Broadcast Media

Indecent and offensive speech generally remain constitutionally protected expression. The Supreme Court has repeatedly demonstrated its willingness to protect offensive speech in situations where the offended person is able to turn his or her attention elsewhere, especially when the offensive conduct takes place outside the privacy of the home.¹⁰¹ But full First Amendment protection for indecent speech does not extend to broadcasting.¹⁰² Concerns over the presence of children in the viewing audience, the limited number of available channels, and the pervasive nature of broadcasting are common justifications of FCC regulations of indecent broadcast programming.¹⁰³

98. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

99. *Id.* at 447.

100. *Leung*, *supra* note 5.

101. See *FCC v. Pacifica Found.*, 438 U.S. 726, 749 n.27 (1978); *Cohen v. California*, 403 U.S. 15 (1971) (holding that persons offended by Mr. Cohen's jacket emblazoned with the phrase "Fuck the Draft" could have avoided further offense by "averting their eyes").

102. See *generally Pacifica*, 438 U.S. 726, 748 (1978).

103. *Id.* at 748-50. See *infra* part V.B.3.

1. Children in the Viewing Audience

In the late 1980s, the FCC cracked down on indecency during hours when children were likely to be watching television.¹⁰⁴ Shortly thereafter, Congress enacted legislation creating a safe harbor, between twelve midnight and six o'clock a.m., during which time stations could broadcast indecent but not obscene programming.¹⁰⁵ In November of 1993, the D.C. Circuit nullified an FCC ban on indecent material between the hours of six o'clock a.m. and twelve o'clock midnight on the ground that it was not the least restrictive means to protect children.¹⁰⁶ Furthermore, the rules were too broad to be considered constitutional.¹⁰⁷ The court stated that the burden was on the government to justify and narrowly tailor its attempts to restrict speech protected by the First Amendment.¹⁰⁸ In response, the FCC extended the safe harbor to eight o'clock p.m., thereby narrowing the speech restriction.¹⁰⁹

2. Scarcity of the Spectrum

While broadcasters have First Amendment rights, these rights are not as extensive or inviolable as those of other media.¹¹⁰ The Supreme Court has accepted the scarcity rationale to justify content-based regulation of the broadcast media.¹¹¹ The Supreme Court opined that the scarce nature of the wavelength spectrum allows the government to set content requirements in order to maximize the public benefits derived from broadcasting.¹¹²

104. See *Action for Children's Television v. FCC*, 932 F.2d 1504 (D.C. Cir. 1991), *cert. denied*, 112 S. Ct. 1282 (1992) [hereinafter *Action for Children's Television II*].

105. See 18 U.S.C. § 1464 (1992); 3 F.C.C.R. 930, n.47 (1987).

106. *Action for Children's Television v. FCC*, 11 F.3d 170, 176-77 (D.C. Cir. 1993) [hereinafter *Action for Children's Television III*].

107. *Id.*

108. *Id.* at 177.

109. Fischer, *supra* note 66, at 75; see *Action for Children's Television v. FCC*, 932 F.2d 1504, 1508 (D.C. Cir. 1991) *cert. denied*, 112 S. Ct. 1282 (1992) (holding that the 24 hour ban on indecent broadcasts was unconstitutional); see *Action for Children's Television v. FCC*, 852 F.2d 1332, 1336 (D.C. Cir. 1988) (holding that FCC failed to adequately consider alternatives and offer reasonable support for its regulation limiting indecent broadcasts to the hours between midnight and six a.m.); see also *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978).

110. See *Red Lion Broadcasting Co. v. United States*, 395 U.S. 367, 386-87 (1969).

111. See *Pacifica*, 438 U.S. at 748. *Pacifica* involved a New York radio station that broadcast satiric humorist George Carlin's "Seven Dirty Words" monologue. The Court relied, in part, on *Red Lion*, citing the scarcity doctrine as support for the FCC's regulatory power in restricting broadcasts containing indecent language. *Id.* See generally *National Broadcasting Co. v. United States*, 319 U.S. 190 (1943).

112. *Red Lion*, 395 U.S. at 387-88.

Cable television, however, has a significantly larger number of channels available and, therefore, receives different treatment than television broadcasters.¹¹³ With the development of cable and satellite television, the spectrum scarcity argument may no longer apply.¹¹⁴ In 1984, the Supreme Court questioned the usefulness of the scarcity rationale and invited Congress and the FCC to demonstrate that the useful life of the scarcity rationale had not expired.¹¹⁵

3. The Pervasive Nature of Television and Radio

In 1978, the Supreme Court adopted a pervasiveness rationale for content-based regulations. In *FCC v. Pacifica Foundation*,¹¹⁶ a New York radio station broadcasted George Carlin's "Seven Dirty Words" monologue at two o'clock in the afternoon.¹¹⁷ The FCC determined that the content of "Seven Dirty Words" was indecent and prohibited by statute.¹¹⁸ The Supreme Court upheld the FCC's determination that such speech in the broadcast media was subject to regulation because the broadcast media had become a "uniquely pervasive presence in the lives of all Americans."¹¹⁹ Listeners and viewers cannot avoid television and radio broadcasts. "To say that one may avoid further offense by turning off the radio when he hears indecent language is like saying that the remedy for an assault is to run away after the first blow."¹²⁰ Speech that is otherwise protected may be regulated where it invades the privacy rights of another, particularly in the home.¹²¹ As such, an audience's privacy rights outweigh the First Amendment rights of the broadcasters.¹²²

Justice Stevens noted that due to broadcasting's unique accessibility to children, the content could be restricted to protect children from indecency.¹²³ Justice Brennan, however, noted in his dissent that the

113. *Turner Broadcasting Sys. v. FCC*, 114 S. Ct. 2445, 2457 (1994).

114. *Id.* But see *Turner Broadcasting*, 114 S. Ct. at 2457 ("Although courts and commentators have criticized the scarcity rationale since its inception, we have declined to question its continuing validity as support for our broadcast jurisprudence . . .").

115. See *FCC v. League of Women Voters*, 468 U.S. 364, 390-91 (1984).

116. 438 U.S. 726 (1978).

117. *Id.* at 729-30.

118. *Id.* at 731-32.

119. *Id.* at 748. The Court also relied on the fact that "broadcasting is uniquely accessible to children." *Id.* at 749.

120. *Id.* at 748-49.

121. *Pacifica*, 438 U.S. at 748.

122. *Id.* at 748-49.

123. *Id.* at 749.

offended listener can simply turn off the television or radio.¹²⁴ He opined that the discomfort suffered by an offended listener does not outweigh the "broadcaster's right to send . . . a message entitled to full First Amendment protection."¹²⁵

Although indecent speech generally receives protection, the public has a limited right not to be confronted with indecent speech inside the home. The Supreme Court has recognized that regulations must balance the broadcaster's First Amendment right with the public's right to be free from exposure to indecent speech while at home.

4. Labeling Programs with a Violence Rating

Critics of the V-Chip argue that labeling programs with violence ratings constitutes a content-based restriction. Their rationale is that labeling imposes a direct penalty on expression and therefore will suppress violent expression.¹²⁶ Furthermore, critics argue that implementation of the FCC's rating system would be automatic, thus censoring programming based on content rather than simply providing viewers with information.¹²⁷ The argument lacks merit because the law specifically calls for the formation of an independent advisory committee consisting largely of broadcast industry personnel and parents.¹²⁸

Critics have also argued that since television violence exists outside the traditional categories of subordinate speech, "a court could invalidate a labeling statute on the basis that it unconstitutionally restricts protected expression."¹²⁹ However, the Supreme Court's past treatment of the broadcast media provides support for advisory regulations. The Court has repeatedly held that the government may justifiably regulate broadcasting based on the limited broadcast spectrum.¹³⁰ Therefore, content-based restrictions are justified and labeling may be allowed.

124. *Id.* at 764-65 (Brennan, J., dissenting).

125. *Id.* at 765-66 (Brennan, J., dissenting).

126. Kim, *supra* note 27, at 1402 (citing *Riley v. National Fed'n of the Blind*, 487 U.S. 781 (1988)). In *Riley* the Court stated that "[m]andating speech that a speaker would not otherwise make necessarily alters the content of the speech [and is] . . . a content-based regulation of speech." *Riley*, 487 U.S. at 795; see also Thomas G. Krattenmaker & L.A. Powe, Jr., *Televised Violence: First Amendment Principles and Social Science Theory*, 64 VA. L. REV. 1123 (1978).

127. Kim, *supra* note 27, at 1404. See also Jane M. Friedman, *The Motion Picture Rating System of 1968: A Constitutional Analysis of Self-Regulation by the Film Industry*, 73 COLUM. L. REV. 185 (1973) (arguing that prior restraint, First Amendment, and Fourteenth Amendment doctrines apply to voluntary motion picture rating systems).

128. Telecommunications Act of 1996, *supra* note 1.

129. Kim, *supra* note 27, at 1406.

130. See *FCC v. Pacifica Found.*, 438 U.S. 726, 748 (1978).

If, however, labeling is informational, as opposed to content-based, it would allow consumers to make more informed choices. Therefore, informational labeling would not be restrictive. The Court would treat labeling as simply requiring the disclosure of information and a strict scrutiny analysis would not apply.¹³¹

C. *The Problem of Defining Violence*

Perhaps the most daunting issue arises from the fact that the law fails to define violence and therefore raises immediate vagueness and overbreadth concerns.¹³² If persons of "common intelligence" must guess at the meaning of the statute, courts will find it void for vagueness.¹³³

Critics argue that the difficulties in defining violence will make the task of identifying the least restrictive means of protecting viewers from violent broadcasts virtually impossible.¹³⁴ A narrow definition may be attacked on the ground that it fails to consider the context of the violence. On the other hand, a broad definition may appear ambiguous because it fails to provide sufficient direction to broadcasters in labeling programs. But the V-Chip legislation does not specifically require broadcasters to label programs with a violence rating. Instead, it merely invites broadcasters to send a violence rating along with the program signal.¹³⁵

The fundamental question that remains is how to define violence so that it serves the purpose of the V-Chip legislation without being overbroad or vague. The proffered definitions attempt to ascertain a fixed point beyond which the content is considered "violent." Considering the different types and various levels of violence found in the broadcast media, no single definition will adequately encompass the scope of violence without being vague or overbroad. One possible solution actually lies within the technology of the V-Chip.

In recent trials of the V-Chip in Edmonton, Canada, programs were rated from zero through five in three categories: violence, language, and sexual content.¹³⁶ The use of these six rating slots facilitates a hierarchical approach to defining violence, thus avoiding the overbroad

131. See 15 U.S.C. §§ 1331-1341 (1988 & Supp. IV 1992) (requiring warning labels on cigarette packages).

132. Deutsch, *supra* note 57, at 1106-08.

133. See *Winters v. New York*, 333 U.S. 507, 518 (1948).

134. Kim, *supra* note 27, at 1409.

135. See Telecommunications Act of 1996, *supra* note 1.

136. Impoco, *supra* note 49, at D2.

language that would otherwise be required. The violence rating definitions used in the second Canadian test were as follows:

- Level 0: None.
- Level 1: Comedic - Includes some cartoons and slapstick comedy.
- Level 2: Mild - Includes non-injury physical contact, no blood.
- Level 3: Brief - Physical contact with minor or moderate injury.
- Level 4: Violent - Physical contact with serious injury or death, limited blood. Includes shootings and other weapon attacks.
- Level 5: Graphic - Contact resulting in serious injury or death. Includes graphic injury, dismemberment, and death.¹³⁷

By utilizing a multi-level approach to defining violence in broadcast media, many of the problems with vagueness and overbreadth can be avoided. Distinguishing between various levels of violence provides far greater flexibility in developing a comprehensive, overall definition that remains clear, concise, and limited in scope.

VI. CONCLUSION

The tension between the desire to protect children from the harmful effects of broadcast violence and the First Amendment rights of the broadcast media continues. The V-Chip, however, will not likely become the panacea for television violence for at least several years. The Telecommunications Act of 1996 requires new television sets to be equipped with the V-Chip within two years, and legal challenges will likely extend that deadline.¹³⁸ Furthermore, the V-Chip will not be completely effective unless it is installed in every television accessible to children. There are over twenty million television sets sold in the United States each year, with over one-half of them purchased as a second television.¹³⁹ At the present rate of television sales, at least a decade will pass before V-Chip market penetration is broad enough to impact broadcast programming.¹⁴⁰

137. *Id.*

138. Telecommunications Act of 1996, *supra* note 1.

139. Cerone, *supra* note 44, at A33.

140. *Id.*

The Telecommunications Act does not expressly limit the free speech rights of the media.¹⁴¹ Broadcasters remain free to broadcast programming as they so desire. Although the V-Chip is less intrusive than an outright ban on televised violence, the risk of chilling free and protected speech still exists. While studies have expressed opinions regarding the impact of violent television on children,¹⁴² the research does not conclusively demonstrate that a reduction in televised violence furthers the state's interest in protecting the well-being of children.¹⁴³

The V-Chip will likely reduce adult viewership, yet it will do so only at times when children are present. The same adults that will have the power to lockout programs with certain ratings will also have the power to view those programs utilizing the same V-Chip circuitry. Requiring the installation of the V-Chip into new televisions does not impose a direct restriction on speech. But to be effective, the V-Chip requires that each violent program carry a signal indicating its violent content and corresponding rating. Requiring broadcasters to include such signals may constitute mandatory speech on the part of the broadcasters; free speech includes both the decision of what to say, as well as what not to say.¹⁴⁴

The V-Chip legislation is the latest attempt to control television violence, but is by no means free of controversy. The legislation remains susceptible to First Amendment attack and is unlikely to fall within the umbrella of any of the existing protected classes of speech. The vagueness and overbreadth concerns in regards to the definition of violence are but a few of the many relevant issues yet to be resolved. The heirarchic approach to defining violence for rating purposes may alleviate some vagueness and overbreadth concerns, but the V-Chip still has a long and difficult fight ahead.

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141. See Telecommunications Act of 1996, *supra* note 1.

142. See, e.g., Leung, *supra* note 5.

143. *Id.*

144. See Cerone, *supra* note 44.

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